A

TING SIEH CHUNG v. HOCK PENG REALTY SDN BHD

COURT OF APPEAL, KUCHING
TENGKU MAIMUN TUAN MAT JCA
ABANG ISKANDAR JCA
AHMADI ASNAWI JCA
B [APPEAL NO: Q-02(IM)-841-05-2015]
24 JUNE 2016

C ***CIVIL PROCEDURE:*** *Adjournment – Application for – Assessment proceedings – Witness from West Malaysia required work permit to testify in Sibu High Court – Adjournment to secure work permit refused – Whether there was great urgency for disposal of assessment – Whether court would be handicapped without witness' evidence – Whether refusal resulted in miscarriage of justice*

D ***EVIDENCE:*** *Fresh or further evidence – Application to adduce – Whether fulfilled all requirements – Whether evidence could not be obtained with reasonable diligence at trial – Whether evidence would considerably impact outcome of case – Whether evidence credible – Rules of Court 2012, O. 56 r. 1(3A)*

E The respondent ('plaintiff') filed an application at the Sibu High Court for the removal of caveats entered by the appellant ('defendant') over lands belonging to the plaintiff. The High Court ordered the removal of the caveat and for assessment of damages before the Deputy Registrar ('DR'). During the assessment of damages before the DR, the defendant called an accountant, one Mr Tam Kok Meng from Kuala Lumpur to testify for the defendant. However, the plaintiff objected to this on the ground that Tam Kok Meng, being from West Malaysia, needed to have a work permit issued to him by the Immigration authorities in Sarawak before he could testify. The DR agreed with the objection. Despite the requests by the defendant for a short adjournment to require the work permit to be issued to Tam Kok Meng, the hearing proceeded without the testimony of Tam Kok Meng. The DR decided in favour of the plaintiff. The defendant appealed against the decision of the DR on the assessment of damages and, *via* an application in encl. 176, sought to adduce: (i) the witness statement of Tam Kok Meng which was not allowed during the hearing before the DR and as such, constituted new evidence before the judge in chambers; and (ii) the subsequent correspondences between the defendant and the Sarawak Immigration Department which showed that the DR was wrong to exclude the evidence of Tam Kok Meng based on a misapprehension of the Sarawak Immigration Regulations. The High Court Judge dismissed the defendant's application in encl. 176 and allowed the defendant's appeal in respect of the assessment of damages, in part. Hence, this appeal by the defendant for assessment of damages ('Appeal 840'), for the dismissal of encl. 176 ('Appeal 841') and the plaintiff's cross-appeal against the assessment of damages ('Appeal 917').

Held (allowing Appeal 841; setting aside order of DR and High Court on quantum of damages)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) Not all applications for adjournments must be granted as a matter of course. Whether an adjournment ought to be allowed or otherwise, involves an exercise of judicial discretion which must be dispensed with judiciously. In dispensing justice, one must always bear in mind the basic principle of natural justice that is *audi alteram partem*. The principle ensures that both or all parties in litigation must be given a right to be heard before the court makes the final adjudication. The opportunity to be heard must be given, especially on a matter that goes directly to the root of the issue at hand. The other half of principle of natural justice is the rule against bias, *nemo in propia causa judex, esse debet* which means that no one should be made a judge in his own case. (para 12)

(2) There was no great urgency for the assessment of damages to be disposed of such as to deny the defendant a short adjournment to secure the testimony of Tam Kok Meng. The value of the witness's evidence to the defendant was indeed immense in the context of the assessment proceedings. The court would be hugely handicapped in the absence of any useful evidence in rebuttal emanating from the opposite side. The DR, in denying the defendant opportunity to adduce evidence through Tam Kok Meng on the basis of a perceived violation of Immigration law, had resulted in a miscarriage of justice to the defendant. (paras 14 & 16)

(3) The defendant had fulfilled all the requirements for fresh evidence to be adduced in that (i) the documents from the Immigration Department were not available during the time Tam Kok Meng was denied the opportunity to testify and they were obtained with due diligence immediately after that; (ii) the evidence was in the nature that would considerably impact the outcome of the assessment proceedings; and (iii) the document, on the face of it, coming from the Immigration authorities, were credible. Further, the plaintiff had not rebutted on the potential impact that the documents from the Immigration authorities might have on the proceedings. (paras 22 & 25)

(4) The DR, having had the benefit of the letter of clarification from the Immigration Department, should not have excluded the rebuttal evidence of Tam Kok Meng on the ground that he did not have a work permit from the Sarawak Immigration Department. The letter of clarification emanated from the authority in charge of Immigration matters affecting Sarawak and it was not challenged by the plaintiff. The trial judge, in ruling that the correspondences had no relevance to the assessment of damages before the DR and that the defendant had failed

to fulfil the requirements laid down under O. 56 r. 1(3A) of the Rules of Court 2012, was in error. In the circumstances, the defendant's application to adduce fresh evidence was allowed. Consequently, Appeal 840 and Appeal 917 had been rendered academic (paras 9, 26 & 27)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') memfailkan permohonan di Mahkamah Tinggi Sibu bagi pembatalan kaveat yang dimasukkan oleh perayu ('defendan') atas tanah-tanah milik plaintif. Mahkamah Tinggi memerintahkan pembatalan kaveat tersebut dan taksiran ganti rugi oleh Timbalan Pendaftar ('TP'). Semasa taksiran ganti rugi oleh Timbalan Pendaftar, defendan memanggil seorang akauntan, Encik Tam Kok Meng dari Kuala Lumpur untuk memberi keterangan bagi pihak defendan. Walau bagaimanapun, plaintif membantah atas alasan bahawa Tam Kok Meng, dari Malaysia Barat, memerlukan permit kerja yang dikeluarkan oleh pihak berkuasa Imigresen di Sarawak sebelum dia boleh memberi keterangan. TP bersetuju dengan bantahan tersebut. Walaupun ada terdapat permintaan oleh defendan untuk penangguhan singkat untuk memohon permit kerja dikeluarkan kepada Tam Kok Meng, perbicaraan berlangsung tanpa keterangan Tam Kok Meng. TP membuat keputusan memihak kepada plaintif. Defendan merayu terhadap keputusan TP bagi pentaksiran ganti rugi dan, melalui permohonan dalam lamp. 176, memohon untuk mengemukakan: (i) kenyataan saksi Tam Kok Meng yang tidak dibenarkan semasa perbicaraan oleh TP dan dengan itu, membentuk keterangan baru di hadapan hakim dalam kamar; dan (ii) surat-menyurat terkemudian antara defendan dan Jabatan Imigresen Sarawak yang menunjukkan bahawa TP salah dalam mengecualikan keterangan Tam Kok Meng berdasarkan anggapan salah terhadap Peraturan-Peraturan Imigresen Sarawak. Hakim Mahkamah Tinggi menolak permohonan defendan dalam lamp. 176 dan membenarkan sebahagian rayuan defendan berkaitan dengan taksiran ganti rugi. Dengan itu, rayuan ini oleh defendan bagi pentaksiran ganti rugi, bagi penolakan lamp. 176 dan rayuan balas plaintif terhadap taksiran ganti rugi.

Diputuskan (membenarkan rayuan; mengetepikan perintah TP dan Mahkamah Tinggi berkaitan kuantum ganti rugi)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Bukan semua penangguhan mesti diberikan sebaik sahaja dipohon. Sama ada penangguhan wajar dibenarkan atau tidak, melibatkan pelaksanaan budi bicara kehakiman yang perlu dilaksanakan dengan bijak. Dalam melaksanakan keadilan, prinsip asas keadilan semula jadi iaitu *audi alteram partem* perlu diingati. Prinsip tersebut memastikan bahawa kedua-dua pihak dalam litigasi mesti diberi hak untuk didengar sebelum mahkamah membuat keputusan terakhir. Peluang untuk didengar mesti diberikan, khususnya berkaitan perkara yang melibatkan akar umbi isu

yang dibicarakan. Sebahagian lagi prinsip keadilan semula jadi adalah kaedah menentang berat sebelah, *nemo in propia causa judex, esse debet* yang bermaksud tiada seorang pun boleh menghakimi kesnya sendiri.

(2) Taksiran ganti rugi tidak perlu ditetapkan sebegitu segera sehingga menafikan defendan penangguhan singkat untuk mendapatkan keterangan Tam Kok Meng. Nilai keterangan saksi tersebut kepada defendan adalah amat besar dalam konteks prosiding taksiran. Tanpa apa-apa keterangan menyangkal yang berguna daripada pihak lawan, mahkamah akan mengalami kesukaran dalam membuat keputusan. TP, dalam menafikan defendan peluang mengemukakan keterangan melalui Tam Kok Meng berasaskan kepada pelanggaran undang-undang Imigresen, mengakibatkan salah laksana keadilan kepada defendan.

(3) Defendan telah memenuhi semua keperluan bagi keterangan baru dikemukakan di mana (i) dokumen-dokumen dari Jabatan Imigresen tidak boleh diperoleh semasa Tam Kok Meng dinafikan peluang untuk memberi keterangan dan ia diperoleh dengan segera selepas itu; (ii) keterangan tersebut bersifat memberikan impak besar kepada keputusan prosiding taksiran; dan (iii) dokumen tersebut, secara jelasnya, yang datangnya daripada pihak berkuasa Imigresen, boleh dipercayai. Selanjutnya, plaintif tidak mematahkan kesan akibat dokumen-dokumen daripada pihak berkuasa Imigresen kepada prosiding tersebut.

(4) Timbalan Pendaftar, setelah melihat surat penjelasan daripada Jabatan Imigresen, tidak sepatutnya mengecualikan keterangan menyangkal daripada Tam Kok Meng atas alasan bahawa dia tidak mempunyai permit kerja daripada Jabatan Imigresen Sarawak. Surat penjelasan tersebut adalah daripada pihak berkuasa yang mempunyai kuasa terhadap perkara-perkara berkaitan Imigresen di Sarawak dan tidak dicabar oleh plaintif. Hakim bicara, dalam memutuskan bahawa surat-surat tersebut tidak relevan kepada taksiran ganti rugi oleh TP dan bahawa defendan gagal memenuhi keperluan-keperluan yang diperuntukkan di bawah A. 56 k. 1(3A) Kaedah-Kaedah Mahkamah 2012, telah terkhilaf. Dalam hal keadaan tersebut, permohonan defendan untuk mengemukakan keterangan baru adalah dibenarkan. Dengan itu, Rayuan 840 dan Rayuan 917 menjadi akademik.

Case(s) referred to:

Capel v. Child (1832) 2 C & J 558 ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lau Foo Sun v. Government of Malaysia [1970] 1 LNS 56 FC ***(refd)***
Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd [2013] 1 LNS 1531 CA ***(refd)***
Tan Kah Khiam v. Liew Chin Chuan & Anor [2006] 4 CLJ 715 CA ***(refd)***
The King v. The Chancellor, Masters and Scholars of the University of Cambridge [1723] 1 Stra 557 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 56 r. 1(3A)

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For the respondent - Lim Heng Choo, Sim Hui Chuan, Alex Lim Lit Tze, George Lim & Alvin Wong; M/s Battenberg & Talma Advocs

[Editor's note: For the High Court judgment, please see Hock Peng Realty Sdn Bhd v. Ting Sieh Chung [2015] 1 LNS 744 (overruled).]

Reported by S Barathi

JUDGMENT

Abang Iskandar JCA:

Background Of The Case

[1] Ting Sieh Chung @ Ting Sie Chung, ("defendant") lodged caveats over seven pieces of land belonging to Hock Peng Realty Sdn Bhd ("the plaintiff") on 23 September 2008.

[2] The plaintiff filed an application *vide* Sibu High Court Originating Summons No: 24-15 of 2009 to have the said caveats removed.

[3] On 13 July 2009, the Sibu High Court ordered the caveats to be removed and that damages arising from the lodgement of the caveats to be assessed before the Deputy Registrar ("DR").

[4] The plaintiff only claimed for the damages in respect of two pieces out of the said seven pieces of land ie, Lot 3585 Block 7 and Lot 976 Block 10, Sibu Town District.

[5] During the hearing of the assessment of damages before the DR, the plaintiff called three witnesses in order to prove his damages whereas the defendant called five witnesses.

[6] The DR, however, rejected one of the defendant's witnesses, one Mr Tam Kok Meng from West Malaysia, citing non-compliance with the Immigration Act 1959/63 namely, for not having a work permit having been issued to him prior. It was the contention of the plaintiff that Tam Kok Meng required to be issued with a work permit by the Sarawak Immigration Authorities before he could testify in court for the assessment of damages. His written statement was also not allowed to be admitted by the DR for the purpose of that proceeding although it was already filed in court and served on the plaintiff before the hearing date. There was no notice given by the plaintiff to the defendant of its intention to object to the calling of Tam Kok Meng as a witness for the defendant. At the end of the proceeding, the DR decided in favour of the plaintiff and ordered the defendant to pay a sum of

about RM20 million to the plaintiff as damages occasioned by the wrongful lodging of the caveats by the defendant over the said two pieces of land belonging to the plaintiff with costs of RM500,000.

[7] The defendant filed a notice of appeal against the decision of the DR on the assessment of damages. Apart from that, on 3 February 2015, the defendant filed an application to the Sibu High Court *vide* encl. 176, to introduce new evidence to show that working permit is not required before Tam Kok Meng can be allowed to appear as a witness, as well for the written witness statement of Tam Kok Meng to be adduced.

[8] On 28 April 2015 the learned High Court Judge, dismissed the defendant's application in encl. 176, with costs of RM3,000. On the same day, the same learned High Court Judge allowed in part, the defendant's appeal in respect of the assessment of damages. These two decisions were appealed by the defendant ie, Civil Appeal No. Q-02(IM)-840-05-2015 ("Appeal 840") for assessment of damages, and Civil Appeal No. Q-02(IM)-841-05-2015 ("Appeal 841") for the dismissal of encl. 176). The plaintiff also filed a cross appeal against the decision of the learned High Court Judge in respect of the assessment of damages *vide* Civil Appeal No. Q-02(A)-917-06-2015 ("Appeal 917").

The Appeal Before Us

[9] We heard all these three appeals on 23 February 2016. After perusing the records of appeal and submissions by both parties, we allowed the defendant's appeal in Appeal 841 with costs of RM15,000 and that the deposit was refunded to the defendant. As a direct consequence of our decision in Appeal 841, the Appeal 840 and the Appeal 917 have since been rendered academic. We had therefore set aside the order of the DR and that of the learned High Court Judge, and ordered parties to proceed with the assessment of damages, but before another DR. We now proffer our reasons for having so decided.

[10] For convenience, we will be referring to parties as they were referred to in the assessment proceedings before the DR. Briefly, to recap, the salient facts pertaining to this case had revolved around the issue of the defendant's desire to call to the witness box an accountant, one Mr Tam Kok Meng from Kuala Lumpur to testify for the defendant in the assessment of damages hearing before the DR. However, the plaintiff objected to this on the ground that Tam Kok Meng, being from West Malaysia, needed to have a work permit issued to him by the Immigration Authorities in Sarawak before he could testify, though he was already inside the witness stand in court. The DR agreed with the objection. Despite requests by the defendant for a short adjournment to require the work permit to be issued to Tam Kok Meng, the hearing proceeded on without the testimony of Tam Kok Meng. Actually, the DR had agreed to give one week adjournment after listening to the

defendant's counsel's submission for an adjournment, but changed her mind after hearing objections from the plaintiff's counsel. Without his evidence, the DR had basically admitted the expert evidence on the accounts coming from the plaintiff's witness, with no rebuttal from the defendant's side at all. Just to recap, the application to adduce fresh evidence which is the subject of the present appeal arose out the refusal of the learned DR to allow time for the defendant to do the needful so as to enable Tam Kok Meng to testify on behalf of the defendant in the assessment of damages.

[11] Having denied Tam Kok Meng the opportunity to give evidence for the defendant, the learned DR went on to find that the defendant had failed to rebut the evidence of the plaintiff on the assessment of damages. It was understandable for the defendant to not miss the irony of the situation, resulting from the very denial by the DR of the opportunity of Tam Kok Meng to adduce what would be the crucial intended rebuttal evidence of the defendant.

[12] It is trite that adjournment is a matter of discretion of the learned DR but that discretion must be exercised judiciously. We recognised that not all applications for an adjournment must be granted as a matter of course. An unwarranted application for an adjournment may indeed be an attempt to unjustly delay the course of justice. But sometimes, an adjournment may well be a way to ensure that justice be done for the case as a whole. Whether an adjournment ought to be allowed or otherwise involves an exercise of judicial discretion which must be dispensed with judiciously, not arbitrarily, nor with caprice. That, to our mind, is too trite, as to require us to cite any case authorities in support thereof. In dispensing justice, one must always bear in mind the basic principle of natural justice that is *audi alteram partem*, a seemingly simple principle grounded upon the consideration that no person shall be condemned, punished or have any property or legal right compromised by a court of law without first having heard that person. It invariably means having to hear the other side of the story, lest one's decision may be impugned for being lopsided. Such a decision would inevitably be susceptible to be avoided on appeal. That principle would, we gather, guarantee the opportunity of the other party in a litigation of being heard, unless *inter alia*, he waives or forgoes the same on his own volition, in which case, he cannot later on complain of being denied of being heard. Put simply, that principle ensures that both or all parties in litigation must be given a right to be heard to present before the court, what essentially their respective position really is, before the court makes the final adjudication. That opportunity to be heard must be given, especially on a matter that goes directly to the root of the issue at hand. Whether a party would succeed after it has been heard is an entirely separate issue altogether. The other half of the principle of natural justice is of course the rule against bias as contained in the Latin maxim of *nemo in propia causa judex*, *esse debet* which, essentially

translated into the English language would mean that "no one should be made a judge in his own case". On these two great pillars, the concept of natural justice is being vigilantly hoisted.

[13] Each application for an adjournment must be considered on its peculiar merits. The court must therefore be vigilant in ensuring that only deserving application is granted with a view that justice to parties be served in granting such an application. From the perspective of an adversarial system in civil litigation, both parties bear the corresponding burden to prove its respective case, and as such, both parties are at liberty to adduce evidence to establish its own case. A granting of an adjournment, in an appropriate case may well provide a window of opportunity to facilitate the dispensation of justice. There are a myriad of reasons why an adjournment may be applied for in the course of a trial, but to be granted by the court, it must not be devoid of merit. Viewed from the opposing party, he must not be unduly and unfairly prejudiced by the granting of the adjournment. Where appropriate, costs may be given against the party requesting for the adjournment. But where a discretion cannot be justifiably exercised in favour of granting an application for an adjournment, then it ought not to be granted, *simpliciter*. The onus lies with the court to discharge that exercise of discretion to decide on the application for an adjournment, one way or another.

[14] Reverting back to the appeal before us, we found no great urgency for the assessment of damages to be disposed off such as to deny the defendant a short adjournment to secure the testimony of Tam Kok Meng. It was the plaintiff who had objected to his capacity to testify on behalf of the defendant on the ground of some non-compliance with the Immigration law in the context of Sarawak. Actually, it was not very clear at that point in time, whether the basis of the legal objection was entirely valid. But the defendant was taking no chances, and had applied for an adjournment to clarify with the relevant authorities in Sarawak and if need be, to apply for the requisite work permit for the intended witness, Tam Kok Meng. The value of this witness' evidence to the defendant was indeed immense in the context of the assessment proceedings. The granting of the adjournment *per se*, did not equate to the court accepting his evidence over that of the plaintiff's evidence on the issue in contention. But what it would serve would be to not deprive a party to a contentious proceeding an opportunity for it to be heard in the litigation before the court made its decision, one way or the other. That is where the *audi alteram partem* principle demands strict compliance, as justice can only be fairly served when the court is properly apprised of the evidence coming, as it were, from both sides of the disputing litigants. The need to hear the other side was made more acute when the amount of damages that was being sought by the other party was huge. The court would be hugely handicapped in coming to a just amount to be awarded to the plaintiff in the absence of any useful evidence in rebuttal emanating from the opposing side.

A It may well be that the evidence from the other side was not strong enough to outweigh the evidence adduced by the plaintiff, but that to our mind, was beside the point. The opposing side, in the absence any strong reason justifying it to be denied to advance his version, must of necessity be heard. That, in our view, would represent what is trite, in the due administration
B of justice. If an authority is needed to illustrate that point, we needed only to cite the decision of this court in the case of *Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd* [2013] 1 LNS 1531; [2014] 1 AMCR 102; [2014] 2 MLJ 322 where it was stated like so:

> Regrettably, in proceeding to act on his own accord, the learned judicial
C commissioner had perhaps downplayed another important component of practical justice in hearing cases before the court, and that concerned the maxim *"audi alteram partem"*.

[15] In that case of *Pembinaan SPK Sdn Bhd (supra)* it was decided by this court that to decide on an unpleaded claim is to deny the opposing party the
D valuable right to answer the claim by adducing such material facts at the trial as it might find necessary to forward to the court to advance its case against the claim. Therein had laid the injustice that could be occasioned to the opposing party in such a situation. The same consideration applied to our present scenario where the opposing party here, being the defendant was
E denied the opportunity to present its case on the issue pertaining to the accounts that formed the critical contention in the assessment of the damages that ought to be awarded against the defendant.

[16] Hence, we were unanimous in our view that the exercise of discretion by the DR in denying the defendant the opportunity to adduce evidence
F through Tam Kok Meng on the basis of a perceived violation of Immigration law, had resulted in a miscarriage of justice to the defendant. That injustice had persisted when the learned High Court Judge refused the defendant's application to adduce fresh evidence at the hearing of the appeal against quantum of damages. To illustrate how much embedded this principle of the
G right to be heard has been in the English common law system, we would cite the ancient case of *The King v. The Chancellor, Masters and Scholars of the University of Cambridge* [1723] 1 Stra 557 where learned Justice Eyre had made the following remark:

> The laws of God and man both have given the party an opportunity to
H make his defence, if he has any … Even God himself did not pass sentence upon Adam before he was called upon to make his defence.

[17] The golden thread that weaved through the tapestry that had since crystallised into this entrenched principle of the right to be heard had been the concept of fair play and fairness that is applicable to both parties. In this
I appeal, such fundamental element of fair play was denied when the defendant was denied the opportunity of adducing the evidence coming from Tam Kok Meng. That unfairness, to our mind, needed to be addressed the way it should be.

[18] As such, having weighed all the facts and circumstances prevailing in this case, we were unanimous in our view that in the interest of justice, this appeal ought to be allowed and that the assessment of damages be remitted to be reheard by another DR. As alluded to by us above, the assessment of damages in this case would invariably result in the defendant having to pay damages. In other words his right over his property would be severely compromised in the event that he was not allowed to be heard before he was compelled to part with his property.

[19] Before the DR, what had happened at the end of the recording of evidence from the witnesses had been that the DR was left with only the evidence emanating from the plaintiff's side, insofar as the amount of losses allegedly suffered by plaintiff was concerned. PW1, Hii Loo Ming had adduced a "summary of losses in respect of Lot 976 Sibu Town Land District arising from the caveat lodged by the defendant." The summary was marked as exh. P2(A). A perusal of the summary had shown that it had simply stated the total sale price of the properties on the caveated land not sold during the duration of the caveat with a multiplier of 30%. That was about it as far as the evidence of PW1 went. There was no evidence to substantiate the multiplier of 30% except the evidence of PW1. As had transpired, the DR felt that she was inclined to accept the plaintiff's case based on the documentary evidence namely, exh. P2(A) and P2(B). Then came the telling part of her reasoning when she had said: "As I have received nothing documentary evidence in rebuttal or contradicting those facts from the defendant, thus I shall accept the evidence laid before the court." And the available evidence before her was the evidence coming from the plaintiff. There was none from the defendant on the accounts aspect because Tan Kok Meng was not allowed to take to the stand by virtue of her earlier ruling. One cannot fail to see the injustice that had been occasioned by the non-granting of the adjournment to thrash out the status of Tam Kok Meng *vis-à-vis* the Immigration rules that were alleged to be in play to prohibit him from testifying in court without first obtaining a work permit. There is much wisdom in the saying that states that justice should not be sacrificed at the altar of convenience.

[20] We would conclude on this issue on *audi altarem partem* by paraphrasing the words attributed to Judge Bayley in the case of *Capel v. Child* (1832) 2 C & J 558, 235 on the critical need for adjudicators, including judicial officials, to observe and practise natural justice, wherein he said that he knew of no case in which you were to have a judicial proceeding, by which a man was to be deprived of any part of his property, without having an opportunity of him being heard, and heard usefully. Invariably, even a mistake by counsel ought not to be visited adversely against his client. Justice ought not to be denied. In a litigation, an injustice visited on one party, taints the justice given to the other. The decision of this court in the case of *Tan Kah Khiam v. Liew Chin Chuan & Anor* [2006] 4 CLJ 715; [2007] 2 MLJ 445 clearly would illustrate that principle where it was held:

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> A reasonable tribunal would have had the interest of justice as the overriding consideration in its mind and taken into consideration the principle that as far as is possible a litigant should not be punished for the error of his or her counsel. In the instant case, a reasonable tribunal armed with all the relevant material would have permitted the Respondent to reopen his case.

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[21] In this appeal before us, the defendant had lost his right to be heard in as far as the intended evidence of Tan Kok Meng was concerned. On that ground alone, in view of the clear evidence that flew across the face of this court pertaining to the right to be heard, the decision of the DR, which was subsequently affirmed by the learned High Court Judge could not, in our respectful view, be allowed to stand.

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[22] On the matter of encl. 176 namely the defendant's application for admissibility of fresh evidence, we agreed with the submissions of learned counsel for the defendant that the defendant had fulfilled all the requirements needed for the fresh evidence to be adduced.

D

[23] Essentially, the defendant had wanted to adduce, *via* the application in encl. 176 the following evidence, namely: (i) The witness statement of Tam Kok Meng dated 4 November 2014 which was not allowed into evidence during the hearing before the DR and as such constitutes new evidence at the hearing of the appeal before the judge in chambers; and, (ii) the subsequent correspondences between the appellant and the Sarawak Immigration Department which show that the DR was wrong to exclude the evidence of Tam Kok Meng based on a misapprehension of Sarawak Immigration Regulations.

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[24] The principle to be applied in admission of fresh evidence during the pendency of an appeal is clearly stated in the English case of *Ladd v. Marshal*l [1954] 3 All ER 745. Our very own apex court in the case of *Lau Foo Sun v. Government of Malaysia* [1970] 1 LNS 56; [1970] 2 MLJ 70 had embraced the same principle which still represents the legal position on the matter till to this day. The statement of the principle by their Lordships is contained in the following paragraph:

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> To justify the reception of further evidence three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

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[25] The documents from the Immigration Department to the effect that there was no need for Tam Kok Meng to require a work permit for the purpose of testifying in court, was not available at the time of the assessment of damages before the DR. Having a valid social pass, which Tam Kok Meng

was in possession of was sufficient in the eyes of the Sarawak Immigration Authorities. In the circumstances of this case, they could not be obtained during the trial as there was notice of objection given by the plaintiff before Tam Kok Meng took to the witness stand, despite the fact that the defendant had filed the witness statement of Tam Kok Meng in court and had the same served on the plaintiff well before Tam Kok Meng was called to the witness stand. In other words, it was an impossibility to obtain the Immigration documents at that moment in time. But the documents were obtained with considerable speed and diligence by the defendant after the DR had ruled that Tam Kok Meng could not testify before her without the work permit. Clearly therefore, the said documents were not available during the time Tam Kok Meng was denied the opportunity to testify and that they were obtained with due diligence immediately after that. It was in the nature of evidence that would considerably impact on the outcome of the assessment proceedings as submitted by learned counsel for the defendant. The fact that those documents were to have an important influence on the result of the case was too clear to see in the circumstances. In our view, those documents were credible, at least on the face of it, coming as it were, from the Immigration Authorities. Indeed, there was no rebuttal from the plaintiff on the potential impact that the documents from the Immigration Authorities might have on the proceedings. The three threshold requirements in the *Ladd v. Marshall*'s case *(supra)* principle, which has also found expression under O. 56 r. 1(3A) of the ROC 2012, had been fulfilled by the defendant in this case.

[26] As such, we were of the view that the learned High Court Judge was in error when he had ruled that the defendant had failed to fulfil the requirements as laid down under O. 56 r. 1(3A) of the ROC 2012. It was the finding of the learned High Court Judge that the correspondences from the Immigration Department "would have no relevance to the assessment of damages before the learned Deputy Registrar and they would not influence the outcome of the learned Deputy Registrar's decision." (See para. 12 of his grounds of judgment.)

[27] With respect, it was our considered view that the learned High Court Judge was wrong in arriving at his decision, because, it is to be recalled that the DR had excluded the rebuttal evidence of Tam Kok Meng on the ground that he did not have a work permit from the Sarawak Immigration Department and was therefore not legally permitted to testify before her. To have allowed him to testify would, in her view, be an act that would tantamount to an illegal act which she could not rightly condone. But if the DR had the benefit of the letter from the Immigration Department on the very issue, there would have been no reason under the law, for the DR to have disallowed such rebuttal evidence from Tam Kok Meng. That clarification from the Sarawak Immigration Department had been contained in the letter dated 18 December 2014 to the effect that the said Department of Immigration had no objection to the entry of Mr Tam Kok Meng to

Sarawak as a witness to attend court by social visit pass. It must be borne in mind that this clarification had emanated from the authority in charge of Immigration matters affecting Sarawak and that it was not challenged by the plaintiff. For the learned High Court Judge to rule the way he did, he had indeed gone against the grain of the evidence before him and could not, in all probabilities be sustained by this court. As such, it was our considered view that the defendant's application to adduce fresh evidence as enumerated in encl. 176 ought to be, and was allowed by us, under the circumstances of this case. We had therefore allowed the defendant's appeal accordingly.

[28] Pursuant to our above order, it follows therefore that we are setting aside the orders of the learned DR and learned High Court Judge on the quantum of damages. We had not, by our order above, prejudged what ought to be the amount of the damages to be awarded by the new DR. That amount would be arrived at after the rebuttal evidence of the defendant through the evidence of Tam Kok Meng would have been judicially and judiciously appreciated by the new DR, for whatever it would be worth in the light of all other evidence before the new DR.